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New Contours of Legality

A Discussion of Scott's Shapiro's Legal Positivism

Introduction

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Scott Shapiro's *Legality* has, no doubt, breathed fresh air into the tradition of analytical positivism. Two aspects of the book are probably mostly responsible for this contribution: first, its distinct take on positivism, which relies on a non-positivist understanding of legal obligation. Second, its decisive rejection of artificial disciplinary boundaries and, instead, engagement with state-of-the-art ideas and arguments from other areas of analytical philosophy.

The former aspect comes out best when Shapiro reaps the fruits of Dworkin's full-blown critique of Hart's reluctance to develop his concept of legal normativity. In rejecting the idea of a *sui generis* legal obligation, Shapiro advances an understanding of obligation bordering on non-positivism. Not quite, however: even though obligations can only be of the moral kind, law remains normative as it is geared toward generating genuine (moral) obligations. That should not, however, be taken to mean that law's normativity is on a par with the normativity of morality. While moral obligation is what the law aims at, the route taken to it needs to remain normative only in a weaker sense, i.e. that of the normativity of planning. Several of the authors in this discussion (Alexy, Rosatti and Gkouvas) discuss and challenge this elegant but demanding construction.

The latter aspect is manifest in Scott's Shapiro's choice of methodology and his engagement with cutting-edge arguments and theories from other areas of philosophy. In this Shapiro is reinforcing – for the first time in such sustained manner – the discontent of a new generation of legal philosophers, positivists and non-positivists alike, with the philosophical isolation of traditional debates in legal philosophy. Instead of surrendering to the comfort of the idiosyncratic vocabulary to which legal philosophy has treated itself over the past few decades, Shapiro aligns his analysis with debates in contemporary moral and political philosophy as well as metaphysics and the philosophy of mind, language and action. The discussants, as is evident by the contributions, aspire to the same standard of philosophical sophistication, which ultimately sets this discussion of *Legality* apart from several other symposia that have appeared since its publication.

These two aspects have determined the choice of contributors to this discussion section, who were also invited to present early drafts of their pieces at the Second Jurisprudence Seminar at the Centre for Law and Cosmopolitan Values (University of Antwerp) on the 31st of May 2012.¹

I would like to thank the contributors for a fine seminar in Antwerp and the work they've put into revising their papers in the light of the discussion there. Special thanks go to Scott

¹ The proceedings of the First Jurisprudence Seminar @ LCV appeared in this journal as 'Three Comments on Joseph Raz's Conception of Normativity' (2011) 2(2) *Jurisprudence* 329-378.

Shapiro, who joined the Antwerp event and contributed decisively to the improvement of the papers with the sharpness, quickness and intellectual playfulness that is characteristic of his manner. The fact that the delay in publishing the papers has taken nothing out of their relevance is ultimately owed to the rigour and richness of *Legality's* arguments.